IN THE

Supreme Court of the United States

October Term, 1977
No. 77-293

EZRA KULKO,

Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO; and SHARON KULKO HORN,

Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION TO AFFIRM OR DISMISS APPEAL.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Appellee, SHARON KULKO HORN, moves the Court to affirm the judgment of the California Supreme Court, or, alternatively, to dismiss the appeal for want of a substantial federal question.

Question Presented.

In an action to establish a Haitian divorce decree as a foreign judgment in California to enforce child support, is it reasonable for California to exercise personal jurisdiction over a father who is a New York resident when the divorce settlement agreement provided for part-time custody with the mother in California and for child support payable in California, and he

sent one child to live with her in California and allowed both children to live with her after having a California public agency investigate the care they were receiving?

Statement of the Case.*

Dr. Kulko and his wife agreed to obtain a divorce and entered into a written settlement agreement in 1972. At the time, as recited in the agreement, she lived in California and he lived in New York, where they respectively still reside. They agreed she would obtain a Haitian divorce, which she did. Until the present action, neither party has ever attempted to establish the foreign judgment in any state of the United States.

The agreement provided that Dr. Kulko would have custody of the two minor children in New York for nine months each year. Mrs. Kulko, now Horn, was to have legal *custody* of the children in California for three months each summer plus other holiday periods:

> "The parties hereto hereby agree to the following with respect to the care, custody and control of the aforementioned children of their marriage:
>
> 1. That during the period of the year when the children are attending school, said children shall reside with and remain in the care, custody and control of the Husband.

Matters of Form. The interested parties are Dr. Kulko, appellant, and his former wife, now Mrs. Horn. They will be referred to as "Dr. Kulko" and "Mrs. Horn" or as the "father" and the "mother" of the minor children whose support is the subject of this action.

"J.S." refers to Appellant's Jurisdictional Statement.

"J.S., App." refers to the Appendix to Appellant's Jurisdictional Statement.

> 2. That during the summer months of mid-June, July, August and mid-September, and during Christmas and Easter vacation weeks, said children shall reside with and remain in the care, custody and control of the Wife.
>
> 3. That during such times as the children are in the care, custody and control of the Husband, the Wife shall have full and unlimited rights of visitation with said children."

While the children were in her custody in California, he was to pay $3,000 per year child support, payable in San Francisco. As of the trial court hearing in this action, Dr. Kulko was in arrearages for child support under the agreement in the amount of $12,900.

In December, 1973, the oldest child, the daughter then 11 years old, told her father she wanted to live with her mother in California. He bought her a one-way airplane ticket and she took all of her clothing with her. The daughter continued to live with her mother in California and still lives with her. Since moving, the daughter has returned to New York to visit her father during the summers of 1974 and 1975, returning to her mother each time via airplane tickets purchased by her father. The record does not show any attempt by the father to keep her in New York or to get her to return to live with him.

In January, 1976, the parties' son, then 14 years old, called his mother, said he was in trouble because his father no longer wanted him, and asked to live with her. She sent him an airplane ticket and he came to California without his father's knowledge.

After the son came to California, the father contacted the Department of Social Services of the City

of San Francisco and a representative contacted the mother and children and reported to the father. Dr. Kulko also wrote to Mrs. Horn:

"Dear Sharon

Darwin has informed me of his intention of living with you. I am prepared to accept his decision. The only question in my mind is the way his decision was reached. He has become angry, beligerent (sic) & unlikeable. I can only attribute it to distortion of reality based upon information fed to him in a biased way. Because of this, my quiet gentle loveable child threatened me to do violence to Dominique.

I don't want a human being around me with this type of behavior pattern. You are welcome to it.

I would have hoped that our relationship was going to improve. I feel at this point it is unfeasable (sic).

I would like to renegotiate the original agreement with you in as much as it is invalidated.

I would like for you to present to me what you feel would be a fair & equitable arrangement.

I would like to do without lawyers as you know how I feel about them.

As always
Ezra"

On February 25, 1976, Mrs. Horn filed a complaint to establish the Haitian judgment as a foreign judgment in California and to modify custody and child support. Dr. Kulko was served in New York in accordance with the California Code of Civil Procedure. He moved to quash service of process.

There is no claim that he was not served, or that the California rules are not calculated to give reasonable notice, or that the California rules were not followed.

Neither does he contest California's jurisdiction to determine child custody. He attacks the reasonableness of California's exercise of jurisdiction to award child support on the grounds he does not have minimum contacts with California.

The trial court resolved all facts necessary to find in personam jurisdiction in favor of the mother and children and against the father [J.S., App. A, p. ii, n. 1] and denied the motion. The California Supreme Court affirmed.

Dr. Kulko appeals.

ARGUMENT.

I

California Courts Have Jurisdiction Over the Father to Make a Valid Child Support Order.

A. His Exercise of Parental Discretion and Control Was Continuing Conduct Having an Effect in California in Addition to His Specific Acts Relating to California.

Dr. Kulko entered into an agreement contemplating part-time custody of the children in California, sent them there several times, sent his 11-year-old daughter to live permanently with her mother, and returned her to California after his summer custody periods. When his son came to California, the father used the services of a public agency to investigate the care the children were receiving, and decided to let them stay, writing the mother to that effect. These were specific acts having an effect in California, plainly using California facilities to raise his children; exercising continuous parental discretion, control, and responsibility to take advantage of California's "laws, institutions, and resources" [J.S., App. A, p. vii] for his children's benefit.

> "(A) nonresident parent who allows his minor child or children to reside in California has by that act purposely availed himself of the benefits and protections of the laws of California to such an extent that absent unusual circumstances or countervailing public policies such act would support personal jurisdiction over the non-resident parent for actions concerning the support of these children." [J.S., App. A, p. vii].

A parent must exercise judgment in the care of his children; that is the very purpose and meaning

of the "care, custody and control" given Dr. Kulko by the agreement and the divorce decree. He exercised that judgment. His decisions, alone, were purposeful acts having an effect in California.

The father's position is that he merely "passively submitted" [J.S., p. 18] when his daughter "announced her decision" [J.S., p. 22] to live in California. The notion that a father is an innocent bystander when an 11-year-old child decides where she will live is startling.

Not only is his proposition novel, it is contrary to law. No minor child can unilaterally decide which parent will have custody. The child's wishes may be considered, though one wonders how much weight will be given to an 11-year-old's opinion, but the final decision is up to the court, or to an agreement between the parents. *Dintruff v. McGreevy*, 34 N.Y.2d 887, 359 N.Y.S.2d 281 (1974); *In re Marriage of Mehlmauer*, 60 Cal.App.3d 104, 131 Cal.Rptr. 325 (1976). Also, the aid of the California and New York courts was available to Dr. Kulko to establish a foreign divorce decree and enforce custody or to get help from the juvenile courts, if he needed help controlling his daughter. N.Y. Family Court Act, §712; *cf., A. v. City of New York*, 31 N.Y.2d 83, 335 N.Y.S.2d 33 (1972); Cal. Welf. & Inst. Code, §601.

His allegedly passive role is belied by his conduct. The children's father should not be able to avoid a support order in the children's domicile because he now pretends to have abdicated his parental duties. He is directly responsible for the children now living in California, as the California Supreme Court determined.

B. The Holding Accords With Established Due Process Principles and Soundly Developing Long Arm Jurisdiction Standards in Domestic Relations Cases.

The applicable due process tests have been established by this Court and were recognized by the California Supreme Court [J.S., App. A, pp. v-vii]. The basic tests are the fairness and reasonableness of requiring the defendant to come to the forum state to litigate. Their application was correct.

First, the defendant must have minimal contacts with the forum state so that the action does not offend traditional notions of fair play and substantial justice. Then, it must be reasonable to require a defense in the forum, a test in which the balance of inconveniences plays a major role. *International Shoe Co. v. Washington*, 326 U.S. 310, 316-317, 90 L.Ed. 95, 102, 66 S.Ct. 154, 158-159 (1945). Jurisdiction may be based on a single event or transaction if it gives rise to the cause of action, *cf., Id.*, at 317, or the defendant by some act avails himself of the privileges of the forum state. *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed.2d 1283, 1298, 78 S.Ct. 1228, 1240 (1958).

The "quality and nature" of Dr. Kulko's activities in relation to California, deriving benefit and protection from California's laws, make it reasonable to require him to litigate child support in California, in the "fair and orderly administration" of justice. *International Shoe Co. v. Washington, supra*, 326 U.S. at 319, 90 L.Ed. at 104, 66 S.Ct. at 160.

Also, California has a manifest interest in protecting its residents, including the Kulko children. *Cf., McGee v. International Life Insurance Co.*, 355 U.S. 220,

223, 2 L.Ed.2d 223, 226, 78 S.Ct. 199, 201 (1957). It is important to protect children from being stranded without support when parents try to avoid their obligations, and application of the minimum contacts approach is appropriate to domestic relations matters. Fathers should not be able to use long arm jurisdiction principles as a shield from their children.

Whitaker v. Whitaker, 237 Ga. 895, 230 S.E.2d 486 (1976);

Mizner v. Mizner, 84 Nev. 268, 270-71, 439 P.2d 679, 680-681, *cert. den.*, 393 U.S. 847 (1968);

Dillon v. Dillon, 46 Wis.2d 659, 671, 176 N.W.2d 362, 368 (1970);

Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 Columbia L. Rev. 289 (Feb. 1973);

Comment, *Domestic Relations: The Role of Long Arm Statutes*, 10 Washburn L.J. 487 (1971).

Just as it has been necessary to expand personal jurisdiction because commercial transactions cross state lines, *McGee v. International Life Insurance Co., supra*, 355 U.S. at 222-223, 2 L.Ed.2d at 226, 78 S.Ct. at 201, it is necessary to expand jurisdiction in domestic relations cases because of increasing mobility. Comment, *State Court Jurisdiction: The Long-Arm Reaches Domestic Relations Cases*, 6 Texas Tech. L.Rev. 1021, 1023, n. 18, 1049, n. 172 (Spring 1975).

Furthermore, balancing the conveniences clearly favors litigating in California. Presence of witnesses in the forum state and the economic consequences of traveling to litigate are significant factors. *Travelers*

Health Assn. v. Virginia, 339 U.S. 643, 648-649, 94 L.Ed. 1154, 1161-62, 70 S.Ct. 927, 930 (1950). Mrs. Horn has been deprived of child support, she and the children live in California, and the evidence as to her needs and their needs, particularly any special needs, will be produced through California witnesses. Dr. Kulko can more easily afford the trip and need only bring evidence as to his income and expenses. It would be unreasonable to force Mrs. Horn and the children to go to New York. *Cf., Mitchim v. Mitchim*, 518 S.W.2d 362, 367 (Tex. 1975).

Nor can Mrs. Horn be accused of forum shopping. In fact, the original forum, Haiti, no longer has an interest in the matter, and Dr. Kulko helped choose the forum in which she must litigate out of economic necessity, by sending the children there and by not paying support. She should not be forced to abandon the children's right to support. *Hines v. Clendenning*, 465 P.2d 460, 463 (Okla. 1970).

Dr. Kulko's reliance on the holding of *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958), is misplaced [J.S., pp. 16, 19, 20, 21]. There, Florida could not obtain personal jurisdiction over a Delaware trustee when the litigation did not arise from an act or transaction of the trustee and the subject of the suit was the validity of an agreement entered into "without any connection with the forum State." At 251, 252. His contract and conduct are connected to California.

The factors militate in favor of California's jurisdiction.

The States' rules for acquiring jurisdiction over absent parents are developing in accordance with principles

established by this Court. *See*, Annot., *Long-Arm Statutes: Obtaining Jurisdiction Over Nonresident Parent in Filiation or Support Proceeding*, 76 A.L.R.3d 708 (1977) and law review material cited above, collecting cases. The development in the state courts should be allowed to continue.

C. The Father Voluntarily Entered Into an Agreement Which Required Performance in California.

The divorce agreement recited that the mother lived in California, would have custody in California part of the year, and would receive child support payments there. The purpose of the agreement was incorporation into a Haitian divorce decree. By their very nature, custody and support provisions are subject to modification in the best interests of the children.

Thus, the father knew part of the original agreement was to be performed in California and he might be subjected to efforts to legally modify those parts of the agreement. Jurisdiction to litigate over a contract exists in the state where an agreement, or part of it, is to be performed. "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connections with that State." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 2 L.Ed.2d 223, 226, 78 S.Ct. 199, 201 (1957). Where a contract is to be performed in whole or in part in the forum state and the defendant could foresee performance there, substantial connections exist for long arm jurisdiction purposes. Gorfinkel and Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 Hastings L.J. 1163, 1215 (May 1970) and cases collected at p. 1214, n. 206.

Now, effectively, the father and mother have agreed to modify the custody and support agreement to provide for virtually full performance in California. This is the import of his request that she keep both children with her. Currently, the agreement itself provides a sufficient basis for jurisdiction in the forum state.

This is an additional, independent basis for personal jurisdiction.

The judgment should be affirmed.

II

No Substantial Policy Question Could Be Resolved by Hearing This Case.

A. The Decision Will Not Deprive Children of Visitation Because It Expressly Distinguishes Visitation in a State From Allowing a Child to Live in a State.

Dr. Kulko argues that the decision below will keep fathers from visiting with their children or allowing visitation with mothers, thus making an exercise of jurisdiction over him unreasonable and raising a Constitutional issue of importance to many families [J.S., pp. 23-25]. His fears are unfounded and are directly contrary to the views expressed in the opinion.

The California Supreme Court carefully examined, approved, and distinguished two California Court of Appeal cases [J.S., App. A, pp. vii-x], which held it was unreasonable to exercise in personam jurisdiction over a father for child support where his contacts with California were merely incidental to visitation with the children. *Titus v. Superior Court*, 23 Cal.App. 3d 792, 100 Cal.Rptr. 477 (1972); *Judd v. Superior Court*, 60 Cal.App.3d 38, 131 Cal.Rptr. 246 (1976). Further, the *Judd* court based its holding largely

upon the fact that "(t)he original domicile of this family was in New York, and petitioner [father] was not responsible for his former wife and his children moving to California." 60 Cal.App.3d at 45, 131 Cal. Rptr. at 249. At the time of the original agreement and each modification as to custody, Mrs. Horn lived in California so she did not leave the marital domicile. Under the *Judd* test, Dr. Kulko was directly responsible for one child moving to California and for both of them staying there. The situation is easily distinguishable from mere visitation. In fact, he never sent them to California for visitation, but for Mrs. Horn's period of "care, custody and control" of the children.

Moreover, if interests are to be balanced, the children's need for support ought to weigh heavily on the scale; it is the strongest of public policies.

No serious question is presented.

B. These Unique Facts Do Not Present an Appropriate Vehicle for Examination of Broad Constitutional Principles.

Few cases concerned with long arm jurisdiction to award support involve circumstances such as these. The agreement between New York and California residents for a Haitian divorce giving custody to each party for part of the year, as opposed to visitation, with the father sending one child to California to live with the mother, continuing to return her after summer visits, and investigating living conditions before deciding to let both children stay in California, present several unique facts. This combination of events is highly unlikely to recur in any given case.

The usual events giving rise to long arm child support jurisdiction issues are absent, *e.g.*, child stealing, refus-

ing to return a child after visitation, one parent leaving the state of marital domicile before or after commencement of an action, both parties moving from the state originally granting the divorce, etc. There is much less reason for hearing this controversy than several domestic relations matters the Court has declined.

The appeal should be dismissed.

Conclusion.

The case was correctly decided in accordance with developing Constitutional law in the field and the judgment should be affirmed. Alternatively, the appeal should be dismissed as one involving unique facts which do not present an issue of substantial interest. There is no basis for granting certiorari.

Respectfully submitted,

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